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In the matter of:

VIRGINIA-CAROLINA AGRICULTURAL:
PRODUCERS ASSOCIATION,
Appellant,

vs.

UNITED STATES DEPARTMENT
OF LABOR,
Respondent.

Date Issued: OCT 21 1988

Case No.: 88-TLC-12

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Donald L. Rosenthal, Esquire
for Appellant

Frank P. Buckley, Esquire
for Respondent

Before: VICTOR J. CHAO
Administrative Law Judge

DECISION AND ORDER

This proceeding arises out of claimed violations of 20 C.F.R. §655.110(g) and the denial of H-2A temporary labor certification. The Immigration and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, made extensive amendments to the temporary labor certification process. Consequently, the H-2A program was created, 20 C.F.R. §655.90, et seq., to replace the H-2 program found at 20 C.F.R. §655.200.

On August 26, 1988, the Regional Administrator, William J. Haltigan, (hereinafter "RA") notified the Virginia-Carolina Agricultural Producers Association (hereinafter "association") that it could not act as an agent in the labor certification process for the coming year. The RA stated he was making such a determination because under current regulations an H2-A labor certification cannot be approved if the employer committed a substantial violation of a material term or condition of certification during the last two years.

The substantial violation the RA relied on was the association's current ineligibility to apply for a labor certification under the predecessor H-2 program. This ineligibility was expressed in a letter dated April 27, 1988, in which the RA informed the association it was unable to act as an agent under the H-2 program; The RA stated he made this determination based on two orders of the United States District Court for the Western District of Virginia,

Judge Jackson L. Kiser presiding, in Virginia Agricultural Growers Association, et al. v. Brock, et al., Civil No. 83-0146-D.

These orders stated that the Department of Labor (hereinafter "DOL") had authority to bar an agent from the certification process when the agent does not comply with labor certification assurances and obligations. Judge Kiser had held the association jointly and severally liable with individual employer members of the association for funds owing to an escrow account the District Court had established. The association and the individual employer members are yet to satisfy this liability. The RA determined that the association's failure to pay its obligations to the escrow fund violated the conditions of the association's certification and rendered the association ineligible under the H-2 program.

The association appealed the RA's April 27, 1988 determination on May 4, 1988. On August 8, 1988, Administrative Law Judge Theodor P. Von Brand granted the DOL's motion for summary judgement, holding that since Judge Kiser had already declared that the DOL had the authority to disqualify the association, Judge Von Brand was collaterally estopped from revisiting that issue. The effect of this ruling was to affirm the RA's declaration that the association was ineligible to participate in the H-2 program.

In his letter of August 26, 1988 the RA relied on this earlier disqualification under the H-2 program to determine that a substantial violation under 20 C.F.R. §655.110(g) had occurred and the RA was thus authorized to disqualify the association under the H-2A program. The association appealed the August 26, 1988 determination of ineligibility under the H-2A program. I received the file and briefs of the parties on October 14, 1988.

The DOL has submitted a record consisting of three documents (R1-3) and the association has submitted a brief with eight documents attached (A1-8). These submissions constitute the record which I have considered in this case.

POSITION OF THE PARTIES

The RA's position is that he has the authority under §655.110(a) to deny a temporary labor certification if he determines that a substantial violation of a certification has occurred. Further, §655.110(g)(1)(i)(D) defines a "substantial violation" as including a determination that an organization is not currently eligible to apply for a labor certification under the H-2 program. The RA argues that since Judge Von Brand's decision renders the association ineligible under the H-2 program and this amounts to a substantial violation of the H-2A regulations, the RA's decision to disqualify the association under the H-2A program was proper.

The association argues that the DOL only has power to disqualify individual employers or associations which also act as employers, but not associations which act solely as agents. The association asserts that the regulations authorize debarment only of (1) individual employer members of associations, 20 C.F.R. §655.110(d); (2) associations acting as joint employers, 20 C.F.R. §655.110(e); and (3) associations acting as sole employers, 20 C.F.R. §655.110(f).

Therefore, the association argues, the RA's determination to penalize the association, which acts solely as an agent of its individual employer members, was improper and should be reversed.

DISCUSSION AND CONCLUSION

The association first argues that the DOL had no authority to disqualify the association under the H-2 program and that Judge Von Brand's ruling of collateral estoppel was error. However, this is not the proper forum to reconsider Judge Von Brand's decision. This court is only of equal strength as Judge Von Brand's court. Judge Von Brand's decision constitutes final agency action on the question of eligibility under the H-2 program and I will not review such a decision.

This appeal involves the RA's determination of ineligibility under the H-2A program. Section 655.110(a) provides that if the RA determines that a substantial violation has occurred he "shall notify the employer that a temporary labor certification request will not be granted for the next period of time in a calendar year during which the employer would normally be expected to request a temporary alien agricultural labor certification . . ." Notably, this section only mentions employers.

But the association is incorrect in stating that the H-2A regulations authorize debarment only of employers or associations acting as employers. Subsection (d) of §655.110 provides for penalties against associations if "the RA determines that the association participated in . . . the violation." That is the case here. The individual employers were found deficient in their payments owed to the escrow account. By order of Judge Kiser, the association was held jointly and severally liable for the deficient payments. Neither the individual employers nor the association has satisfied this obligation.

Accordingly, the RA stated in his April 27, 1988 letter that he had declared the individual employers ineligible under the H-2 program. (A1) The RA further stated that since the association was jointly and severally liable and the payments had not been made, the association was also ineligible under the H-2 program. (A1) This disqualification meets the definition of "substantial violation" found at §655.110(g)(1)(i)(D). Subsection (d) of §655.110 allows penalties against the individual employers and the association if the RA determines that the association participated in the violation. Since the RA determined, quite reasonably, that the association had participated in the violation, the association could be penalized under §655.110(d).

Significantly, the definition of "substantial violation" in §655.110(g) includes "one or more actions of commission or omission on the part of the employer or the employer's agent" which the RA determines fall within the actions further enumerated in the remainder of that subsection. (emphasis Supplied) There is thus ample language in the regulations to reject the association's argument that the regulations do not apply to associations acting solely as agents. Subsections (d) and (g) of §655.110 both refute this argument. Accordingly, I affirm the August

26, 1988 determination of the Regional Administrator declaring the association ineligible to act as an agent under the H-2A temporary labor certification program.

VICTOR J. CHAO
Administrative Law Judge

Washington, D.C.
VJC:tpl